Filed 1/28/10 P. v. Valadez CA5



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>HECTOR MANUEL VALADEZ,<br><br>Defendant and Appellant. | F056857<br><br>(Super. Ct. No. VCF207366)<br><br>**OPINION** |

APPEAL from a judgment of the Superior Court of Tulare County. Gary L. Paden, Judge.

Daniel A. Bacon for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Lloyd G. Carter, Deputy Attorneys General, for Plaintiff and Respondent.

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## ***PROCEDURAL HISTORY***

Appellant Hector Manuel Valadez was charged with eight counts of forcible lewd acts upon a child in violation of Penal Code[1] section 288, subdivision (b)(1), and three

[1]All further statutory references are to the Penal Code.

counts of lewd acts upon a child in violation of section 288, subdivision (c)(1). The victim was his daughter, whom he had molested for a period of six years. Pursuant to a negotiated agreement, Valadez entered a plea of no contest to two counts of forcible lewd acts. The terms of the agreement were that Valadez would plead to the two felony counts in exchange for dismissal of the remaining counts, and a sentence consisting of a three-year lower term for each of the two offenses, to run consecutively, for a total term of six years. At the time the plea was taken, the court incorrectly advised Valadez that he could be placed on parole for a period of 10 years after release from custody.

Valadez moved to withdraw his plea on the grounds that it was not knowingly, intelligently, or voluntarily entered because he did not understand the terms of the plea or its consequences. Valadez claimed his first language is Spanish and, because he was not provided a Spanish language interpreter, he did not understand his attorney. The court denied the motion, finding that Valadez understood English and was not being truthful when he claimed he did not understand the terms or consequences of the plea.

Valadez was sentenced to the middle term of six years for each offense. The court ordered the terms to run concurrently, for a stipulated total term of six years. The court further ordered a restitution fine of $2,400 and incorrectly advised Valadez he would be subject to a maximum 15-year parole term upon release from custody. The statutory maximum period of parole is five years. (§§ 3000, subd. (b)(1), 667.5, subd. (c)(6).)

## ***FACTUAL SUMMARY***

The facts related to the underlying offense are not pertinent to the issues raised on appeal. In brief, Valadez's 14-year-old daughter reported that she witnessed her father molest her 15-year-old sister. During the subsequent investigation, the 15-year-old daughter reported that her father had molested her since she was nine years old. The molestation consisted of forcibly fondling the victim's breast and vaginal areas.

## ***DISCUSSION***

Valadez has raised a number of issues claiming that the trial court improperly denied the motion to withdraw the plea and that the sentence imposed violated the terms of the plea agreement. He claims he should be allowed to withdraw the plea because he did not have access to a Spanish language interpreter at the plea hearing, even though his first language is Spanish, pointing out that he was assisted by a Spanish language interpreter at all other hearings. He also claims the trial court's misadvisements concerning the maximum parole term led to a plea that was not knowingly and voluntarily entered and that the court's "imposition" of a maximum 15-year parole term violated the plea agreement. Lastly, he claims that he was not advised that a $2,400 restitution fine would be a consequence of his plea, and imposition of the fine violated the terms of the plea agreement. We reject all of these contentions and affirm the judgment.

### *I. Spanish language interpreter*

Valadez's first language is Spanish. Prior to entering his plea, however, he was not assisted by a Spanish language interpreter and spoke in English with his attorney and to the court. After the plea was entered, Valadez claims he "realized there was significant confusion on his part regarding the nature and consequences of his plea," and he moved to withdraw the plea on the grounds that it was not knowingly and voluntarily entered because of the language barrier.

The California Constitution guarantees a person who is unable to understand English and who is charged with a crime the right to an interpreter throughout criminal proceedings. (Cal. Const., art. I, § 14.) Both federal and state courts recognize that due process requires that a criminal defendant who does not speak English well enough to understand and participate in his or her criminal prosecution be provided the services of an interpreter. (*People v. Carreon* (1984) 151 Cal.App.3d 559.) However, as we pointed

out in *In re Raymundo B.* (1988) 203 Cal.App.3d 1447, 1453, the right to an interpreter is premised upon the foundational fact that the defendant is unable to understand English.

In many cases, it is immediately evident that a criminal defendant is unable to understand English and that an interpreter is needed. In other cases, however, the need is not as apparent. "While the fact that the person who has been charged with a crime states that he does not understand English and requests an interpreter on that basis may be some evidence of the fact that the charged individual does not understand English, it cannot be considered conclusive proof of that lack of proficiency in English." (*In re Raymundo B., supra*, 203 Cal.App.3d 1447, 1453; see also *People v. Ramos* (1970) 26 N.Y.2d 272, 275 [fact that defendant testified in Spanish does not mandate conclusion that defendant did not adequately understand English; only when defendant exhibits inability to understand does due process require court to determine whether interpreter is needed].)

Whether a defendant understands English is a factual question. In this case, the trial court, when faced with the allegation that Valadez did not understand English and did not understand the plea proceedings, conducted a factual inquiry. The court relied not only upon its own recollections of the plea proceeding, but heard evidence on the issue of Valadez's English proficiency. The probation officer who interviewed Valadez and wrote the presentence report testified that she was fluent in Spanish and began her interview with Valadez in Spanish. She said that, although she initially asked Valadez questions in Spanish, he answered her in English, even after they moved to more "intricate" questions. The probation officer testified that, toward the end of the interview, the two spoke primarily in English. She said Valadez's English was excellent, that he answered all questions appropriately, did not seem confused about any of the questions asked in English, and did not struggle with any words.

The court also heard from Valadez, who testified with the assistance of a Spanish language interpreter. Valadez denied conducting the probation interview in English, saying he asked to speak in Spanish. He said he only speaks some English and did not

understand exactly what was being said. The court noted that, during this testimony, Valadez was responding to questions asked in English before the interpreter could translate them into Spanish. When asked about his emotional responses at the plea proceeding, which the court noted were appropriate, Valadez answered, "it was very difficult for me to accept all of that. And I was not in agreement and I never thought I would proceed with the court, but I proceeded with what my attorney had told me more or less." Valadez did not claim he misunderstood or failed to understand what was said; he said that he did not agree to or accept what was said. The court noted that, during the victim-impact statements, which were made in English, Valadez had a "total meltdown" and that, had "he not understood what was being said, there's no way in the world he would have acted or reacted in that manner." Valadez avoided answering whether at the plea proceeding he talked to his lawyer in English or Spanish.

The court found that Valadez lacked "any credibility on the stand" and stated that the court did not "believe a single thing" Valadez said. The motion to withdraw was denied. Implicit in the court's ruling is that Valadez was able to understand English and was not entitled to an interpreter under the California Constitution. In our system, the trial court determines matters of credibility, and we will sustain a factual determination made by a trial court where there is sufficient evidence to support it. (*People v. Avina* (1989) 211 Cal.App.3d 48, 56; *People v. Collins* (1971) 20 Cal.App.3d 601, 611 [appellate courts review factual finding for sufficiency of evidence to support conclusion of finder of fact].)

We conclude the evidence at the hearing on the motion to withdraw the plea is sufficient to support the trial court's finding that Valadez was able to understand English and was not entitled to the services of a Spanish interpreter. The fact that the trial court appointed an interpreter for all proceedings following Valadez's assertion that he did not understand English does not change our view since the trial court may well have done so simply out of an abundance of caution.

## *II. Failure to advise of direct consequences*

At the plea hearing, the trial court initially advised Valadez that he would be subject to a maximum three-year term of parole upon release from custody. It later corrected that statement and advised Valadez that he would be subject instead to a maximum 10-year term of parole. The correct maximum term, however, is five years. (§§ 3000, subd. (b)(1), 667.5, subd. (c)(6).) Respondent concedes that the trial court was incorrect, but argues there can be no prejudice. In a related argument, Valadez argues that the plea should be set aside because the trial court failed to advise him of the possibility that a restitution fine would be imposed. (§ 288, subd. (e); § 1202.4, subd. (b)(1).) With respect to this argument, the respondent argues that the issue is waived for failing to object at trial, and no prejudice has been shown. We agree the court should have warned of the discretionary restitution fine and stated the correct parole term when giving its advisements, but also agree there is no prejudice. We do not address the issue of waiver.

A criminal defendant is entitled to know the direct consequence of his plea. Both a mandatory parole term and a restitution fine are direct consequences of a guilty plea. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605; *In re Moser* (1993) 6 Cal.4th 342, 351; *People v. Walker* (1991) 54 Cal.3d 1013, 1022-1023.) However, a defendant who seeks to set aside his plea as a result of the court's failure to advise correctly of the direct consequences of his plea must show a reasonable probability of prejudice. (*People v. McClellan* (1993) 6 Cal.4th 367, 378; *Walker*, *supra*, at pp. 1022-1023.) "[A] defendant (even on direct appeal) is entitled to relief based upon a trial court's misadvisement only if the defendant establishes that he or she was prejudiced by the misadvisement, i.e., that the defendant would not have entered the plea of guilty had the trial court given a proper advisement." (*In re Moser*, *supra*, at p. 352, citing *Walker*, *supra*, at pp. 1022-1023.)

Valadez cannot establish prejudice. He was willing to enter his plea after being advised that the maximum parole term was *up to 10 years* rather than the three years

initially stated as part of the plea agreement. Under these circumstances, we are confident that Valadez would have been willing to enter his plea had he been correctly advised that, upon release from custody, he would be subject to a maximum parole term of five years.

Likewise, although the trial court failed to advise Valadez about the restitution fine, Valadez cannot show that it is reasonably probable he would not have entered the plea had the advisement been given. First, Valadez does not assert that he would not have entered the plea had he known a restitution fine would be imposed. Valadez never claimed in his motion to withdraw that the restitution fine was unexpected or a deal breaker for him. (*People v. McClellan, supra,* 6 Cal.4th at p. 378 [although defendant alleges that, had he properly been advised, he would not have entered guilty plea, where there is nothing in record to support contention, there is no showing of prejudice].)

Second, in determining prejudice, "[t]he court should consider the defendant's financial condition, the seriousness of the consequences of which the defendant *was* advised, the nature of the crimes charged, the punishment actually imposed, and the size of the restitution fine. [Citations.]" (*People v. Walker, supra,* 54 Cal.3d at p. 1023.) Valadez was facing a significant number of counts and a much greater period of confinement than the six years stipulated to in the plea agreement. Nine felony counts were dismissed as a result of his plea. The charges with which Valadez were charged authorized a restitution fine of up to $10,000. (§ 288, subd. (e).) The court imposed a much lower amount than that authorized under the statute. It is highly unlikely that, had Valadez known he was facing a possible restitution fine, he would have rejected the plea agreement.

***III. Failure to comply with plea agreement***

Valadez's last two arguments are similarly related to each other and require application of a second prong analysis found in *People v. Walker*. *Walker* explains its second prong as follows: "When a guilty plea is entered in exchange for specified

benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement. The punishment may not significantly exceed that which the parties agreed upon. [¶] '"[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."' [Citation.]" (*Walker, supra,* 54 Cal.3d at p. 1024.) This prong is not subject to a harmless-error analysis. (*Id.* at p. 1026.) *Walker* noted that not every deviation from the terms of a plea agreement requires that the agreement be set aside. The variance must be significant in the context of the plea bargain as a whole. A punishment that is insignificant relative to the whole may be imposed without violating a defendant's rights or the spirit of the agreement even though it was not part of the plea agreement. (*Id.* at p. 1024, citing *Santobello v. New York* (1971) 404 U.S. 257, 262.)

Using this analysis, we must determine whether the imposition of the statutory parole term and the restitution fine constitute a violation of the plea agreement, entitling defendant to some form of relief. (*In re Moser, supra,* 6 Cal.4th at p. 351.) In this case, the parole term was a part of the negotiated plea agreement, up to a maximum of 10 years. Although the court stated at sentencing that the maximum parole term was 15 years, the maximum length of parole is not set by the trial court, but by the Legislature. (*Id.* at p. 357.) The length of a parole term is not a permissible subject of the plea negotiation. (*Ibid*.) The court could not and did not "impose" a maximum parole term. The maximum parole term is established by statute and, in this case, is five years. The five-year maximum does not *violate* the terms or spirit of the agreement since it is substantially less than the maximum term agreed to by Valadez.

Valadez does not suggest that the restitution fine was a subject of discussion during the plea-negotiation process or that the prosecutor made any promises or inducements relevant to the fines to be imposed. When the court recited the terms of the agreement, there was no mention of the restitution fine. (Cf. *People v. Walker, supra,* 54

Cal.3d at p. 1024 [when amount of appropriate restitution fine imposed could vary significantly depending upon facts of case, restitution fine should be considered in plea negotiations].) However, the trial court's omission at a change-of-plea hearing of advice regarding a statutorily mandated restitution fine does not transform the court's error into a term of the parties' plea agreement. (*People v. McClellan, supra,* 6 Cal.4th at p. 379.) Valadez did not assert, when he moved to withdraw his plea, that the restitution fine was part of his negotiated agreement. In the absence of any record that the restitution fine was a term of the plea agreement or that Valadez understood that he would not be subject to a restitution fine, we will not presume that the fine was a negotiated term of the plea agreement that the government has not fulfilled.

***DISPOSITION***

The judgment is affirmed.

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Wiseman, J.

WE CONCUR:

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Vartabedian, Acting P.J.

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Gomes, J.